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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1449

THE STATE OF FLORIDA,

Petitioner,

vs.

SHEROLYN DENISE HARRISON,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, SHEROLYN DENISE HARRISON, asks leave to file the attached petition for a writ of certiorari to the United States Supreme Court, without prepayment of costs, and to proceed in forma pauperis pursuant to Rule 46.

Respondent was declared indigent and was represented by the undersigned Office of the Public Defender at trial and on appeal. Respondents financial status has not changed in the interim.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY: _____
BENNETT H. BRUMMER
Public Defender

BY: _____
PETER RABEN
Assistant Public Defender
Counsel for Respondent
305/545-3003

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 80-1449

THE STATE OF FLORIDA,)
Petitioner,)
vs.)
SHEROLYN DENISE HARRISON,)
Respondent.)
)

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORM PAUPERIS

I, Sherolyn Denise Harrison, being sworn according to law, depose and say, in support of my application to proceed without being required to prepay costs or fees:

1) I am the petitioner in the above-entitled cause.

2) Because of my poverty, I am unable to pay the cost of said cause.

3) I am unable to give security for the same.

4) I believe I am entitled to the redress I seek in said cause.

5) I have previously been declared indigent and have been represented by the Office of the Public Defender at trial and on direct appeal.

6) The nature of said cause is briefly stated as follows:

I am Respondent on a petition for certiorari after having a Florida appellate court say that my person was illegally seized and searched.

Sherolyn Denise Harrison
SHEROLYN DENISE HARRISON

Subscribed and Sworn to Before
me this 26th day of March, 1981.

Linda W. Sanders
NOTARY PUBLIC, STATE OF FLORIDA AT LARGE

My Commission Expires:
Notary Public, State of Florida
My Commission Expires Nov. 6, 1984
Bonded thru Ray-Lee Insurance, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

BENNETT H. BRUMMER
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

Respondent, Sherolyn Denise Harrison, was the Appellant in the Third District Court of Appeal of Florida, and the Defendant in the trial court. The Petitioner, the State of Florida, was the Appellee in the Third District Court and the Prosecution in the trial court. In this response the parties will be referred to as they stood in the trial court. The Appendix filed by the State constitutes an adequate factual record and will be referred to with page designations. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE

Sherolyn Denise Harrison was informed against in Miami, Dade County, Florida on September 28, 1979 for the criminal offenses of trafficking in cocaine and possession of cocaine with intent to sell. The contraband which served as a basis for the proseuction was seized from the defendant by police officers in the course of a search of the defendant's person.

Pursuant to a defense motion to suppress evidence illegally seized, an evidentiary hearing was held in the trial court on the merits of the defendant's motion. (A. 1-71).

The State called one witness[1] to support its contention that the contraband sought to be introduced into evidence was legally discovered and seized.

Judy Wolfe identified herself as a police officer employed by Dade County, assigned to the narcotics division of the Organized Crime Bureau and stationed at the airport on August 9, 1979. (A. 9, 10). Wolfe mentioned the seminars she attended and her specialized duties of narcotics enforcement at the airport for the last year; specifically, the observation of a multitude of people (while in plainclothes) to discover drug flow out of the source city of Miami. (A. 11, 12).

Despite reference to a "profile" (A. 12) no testimony was adduced as to what constitutes a profile of a smuggler's normal characteristics.

Wolfe testified that while at the airport with her partner, Detective Titus (A. 13) she observed a man (hereinafter known as Evans) barge in front of a line of people at the National Airlines ticket counter. (A. 15). After Evans was made to wait a period, he began to transact a purchase when he was joined by a woman (hereinafter known as Raymond). (A. 16).

---

[1] The State stipulated before the hearing that no search warrant was obtained in the investigation. (A. 8). Thus assuming the burden of establishing Fourth Amendment compliance, the State called the only witness and questioned on direct examination. (A. 9).

Wolfe overheard Evans tell Raymond to go on toward the gate and he would meet up with her; Wolfe saw Evans hand over a number of hundred dollar bills, and receive one[2] ticket for a flight leaving in ten minutes for Los Angeles. Evans was carrying one small bag. (A. 16, 17).

Evans moved quickly from the counter toward the concourse where he joined Raymond who was now in the company of the defendant, Sherolyn Harrison. (A. 17). Harrison was carrying a small child and a purse; Wolfe did not recall if she carried any luggage. (A. 18).

The three individuals proceeded together up an escalator, past a security checkpoint, all the while being followed and watched by Wolfe and Titus. (A. 19). After they cleared the security checkpoint, Titus stopped Evans and spoke with him. (A. 19); Wolfe waited a few seconds, watching Raymond and Harrison walking further down the concourse, and then Wolfe stopped them. (A. 19).

Wolfe approached Raymond and Harrison, identified herself as Detective Wolfe, of the police department and testified "I would like to ask them a couple of questions, if they had no objection, before they caught the flight." (A. 19). Wolfe opened a case and displayed a badge when stopping the two women. (A. 20).

Harrison remained silent upon Wolfe's request; Raymond said she didn't mind, as long as she didn't miss her flight. Wolfe asked for identification, and none was produced. (A. 21). Wolfe then asked if she could search their belongings, telling the women they could refuse. (A. 23). As Wolfe testified they consented, a search of the two purses resulted.

Nothing of significance was found in the defendant's purse. (A. 24, 46, 47). In Raymond's purse Wolfe found airplane

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2 However, on cross examination Wolfe testified that she expected a party of three to be traveling together due to the amount of money exchanged between Evans and the ticket agent. (A. 39-41).

tickets indicating that a Mr. and Mrs. Kahn and a Mr. Jones had flown from Los Angeles to Miami four days earlier; also found in Raymond's purse were two marijuana cigarettes. (A. 24). Wolfe said the two cigarettes were of no significance, and Wolfe had no intention of arresting Raymond for the misdemeanor of possession. (A. 24, 46-49).

At this point the group of women were joined by Evans and Detective Titus and the questioning continued as the entire group walked together toward the gate. (A. 24). Harrison told Wolfe she was from Miami and going to Los Angeles for a few days (A. 24); Raymond said she was going home to Los Angeles. (A. 25). They were asked by the officer about luggage; the women said there was none other than that being carried. (A. 25).

As the questioning and surveillance continued Wolfe learned from Detective Titus that Evans had tickets in the name of Mr. and Mrs. Kahn and Mrs. Johnson, had no identification, and then claimed to be Oswald. Titus was able to confirm Wolfe's suspicions that the three were traveling under aliases. (A. 27).

Wolfe believed, based upon the aliases, the small amount of luggage and the destination of these people "that, perhaps, these people were smuggling narcotics." (A. 27).

Though Wolfe testified that at this point Harrison was "free to leave" the officers maintained their contact and surveillance and continued on with the three to the gate. (A. 27, 28).

Wolfe then mentioned her observation, as she was walking down the concourse questioning the women, of a bulge on the abdomen of the child being carried by Harrison. (A. 28).

Wolfe said the bulge was suspicious; the child looked as if she were wearing a diaper or Pamper beneath her clothes, but the swaddling appeared twice as thick in front. Based upon her experience, Wolfe suspected the bulge was contraband. (A. 28, 29).

Wolfe told Harrison to put the child down; Wolfe reached into the childs trousers and felt a plastic bag containing a

granular substance consistent with cocaine. Harrison was arrested and the child seized. (A. 30).

Wolfe testified that she seized the baby due to the harmful nature of cocaine if it were to be ingested into the child's orifice; however, when Wolfe discovered the powder was in a bag, and the child was wearing plastic pants and a Pamper, the substance was allowed to remain in the child's pants. (A. 30, 31, 35).

Evans and Raymond were arrested for conspiracy. (A. 33). Nothing was taken from Harrison's person on her arrest. (A. 34).

Wolfe was cross-examined as to two separate facets of her encounter with the defendant'; first of all, why Wolfe even stopped Harrison for questioning, and then the actual search and seizure.

As to what Harrison did to arouse Wolfe's suspicions was the following questioning aimed:

> Q: Detective Wolfe, up to the point where you walked up to the two young ladies and identified yourself, what specifically did the defendant Sherolyn Harrison do that aroused your suspicion? What did she do--not what the other people did--but what was she doing that made you suspicious of her, specifically?
>
> A: I would say that what made me suspicious of her, not so much an active thing she did, perhaps more what she did not do.
>
> Q: What did she not do?
>
> A: That was--she was hanging very far away from the other two people for the period of time the ticket was being purchased as though to disassociate herself. I was surprised to see her together with the other two people.
>
> Q: In fact, right up until the time that Mr. Evans caught up with the two women, you believed that Sherolyn Harrison, had nothing to do with Evans and Raymond?

A: That is right. I didn't see her enter the scene until, really, quite at the end.

Q: So your questioning or your introduction to Miss Harrison initially was based upon the fact that she was being aloof or apart from the other two people and, subsequently, met up with and that is why you wanted to talk to Sherolyn Harrison.

Correct me if I am wrong.

A: That was part of it, certainly.

Q: What else had she done besides that?

A: She had, herself, alone, apart from the other two, not done anything else.

Q. For all you know, she could have been seeing those two people off at the gate, "See you around. Have a nice trip to L.A."

A: Yes. That is possible.

(A. 38, 39).

Wolfe confirmed that she only suspected the use of an alias after inspecting the ticket stubs in Raymond's purse. (A. 47, 48).

Because of the suspicion generated in the officers mind, Wolfe felt that contraband was being carried, but did not know where. (A. 50). Thus, upon seeing a bulge in the diapers of the baby, Wolfe believed it to be hidden narcotics. (A. 54). No mention of a hidden weapon was made.

Wolfe agreed that Harrison only put the child down on Wolfe's command; upon compliance, Wolfe reached into the child's trousers without consent. (A. 58). On this evidence each side rested. (A. 62).

The defense argued to the court the motion should be granted for two reasons; 1) the initial approach and detention of the defendant was without basis under the Fourth Amendment, and resulted in an unlawful seizure, and 2) the illegality inherent in Wolfe searching the child carried by the defendant on observing a bulge, which falls short of the probable cause necessary to conduct a warrantless search. (A. 62-69).

The State responded by arguing that Harrison had no standing to contest the search of the child in her arms. The court rejected this approach. (A. 68). So the State argued that the suspicious circumstances combined with the bulge created a duty towards Officer Wolfe to search the child, "for the health, safety and welfare of the toddler Sherolyn Harrison was carrying." (A. 70).

The court found, based upon the circumstances of the detention and the tender age of the child, that there was probable cause for the initial stop and inquiry; that after the stop terminated, there existed probable cause to believe drugs were hidden on the child. (A. 70, 71). The motion was denied.

On direct appeal to the Third District Court of Appeal, the courts ruling was reversed per curiam. (A. 72, 73). In a concurring opinion Judge Hubbart indicated that, aside from the propriety of the stop and detention of the defendant, a full blown search for narcotics is not permitted absent probable cause, which was lacking in this case. (A. 73).

From this ruling of the District Court of Appeal the State petitions this Court for certiorari review.

ARGUMENT

FLORIDA'S THIRD DISTRICT COURT OF APPEAL PROPERLY DETERMINED UNDER THIS COURT'S PRONOUNCEMENTS IN TERRY v. OHIO, 392 U.S. 1 (1968) AND BROWN v. TEXAS, 433 U.S. 47 (1979) THAT THE DETAINING, INTERROGATING AND SEARCHING OF THE RESPONDENT WITHOUT HER CONSENT WAS A SEIZURE UNDER BOTH FLORIDA AND FEDERAL CONSTITUTIONAL LAW. THE DISTRICT COURT ALSO PROPERLY CONCLUDED THAT SUCH A SEIZURE WAS WHOLLY WITHOUT ARTICULABLE SUSPICION UNDER BOTH FLORIDA AND FEDERAL LAW, AS SET FORTH IN REID v. GEORGIA, ___ U.S. ___, 100 S.Ct. 2752 (1980) AND UNITED STATES v. MENDENHALL, ___ U.S. ___, 100 S.Ct. 1870 (1980).

Sherolyn Harrison was stopped, detained, questioned, searched and eventually arrested by police officers, acting without a warrant. (A. 8). State action by officers without prior judicial

approval is per se unreasonable, absent Fourth Amendment excuse; the burden devolves upon the State to establish the justification. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Taylor v. State, 355 So.2d 180 (Fla. 3d DCA 1978).

The evidence adduced by the State warranted granting of the defendant's motion to suppress evidence on two basis: 1) the initial stop of the defendant was not based upon a reasonable suspicion of criminal activity, and the contraband seized in the course of the police investigation during the impermissible detention was inadmissable; and 2) assuming arguendo no nexus between the illegal detention and the search which produced the contraband sought to be suppressed, the search was nevertheless conducted without Fourth Amendment justification. Each argument will be addressed separately.

A

Florida's Third District Court Of Appeals Properly Reversed The Denial By The Trial Court Of The Defendant's Motion To Suppress Evidence Seized From The Defendant Where The Initial Stop Of The Defendant Was Not Based Upon A Reasonable Suspicion That She Was Engaged In Criminal Activity And The Contraband Seized From The Defendant During The Course Of The Stop Was Therefore Obtained In Violation Of The Fourth And Fourteenth Amendment To The Constitution Of The United States And Article I, Section 12 of the Constitution Of The State Of Florida.

On August 9, 1979 Officer Wolfe approached Sherolyn Harrison and Nancy Raymond as they were walking along an airport concourse, attempting to catch a flight which left in less than ten minutes. (A. 14, 18, 19). Officer Titus had just seconds earlier stopped their companion, Evans, to speak with him a few feet away from where the women were stopped. (A. 19). One can infer from Officer Wolfe's earlier observation (that Evans purchased all the travel tickets the three would be using and he was not observed giving the purchased tickets over to Raymond or Harrison (A. 11)) that Evan's possessed the airplane tickets for all three of them, and when Titus stopped Evans, they were without the resources necessary to board their flight.

Wolfe approached the two women as they were walking and told them her name, her position as a police officer, and made a request to question them before their flight left. (A. 19). During this approach, Wolfe displayed a police identification badge. (A. 20). In this fashion were Raymond and Harrison initially impeded in their travel. To contend that such police conduct does not constitute a seizure within the purview of the Fourth Amendment would evidence naivete.

SEIZURE

A person has been seized within the meaning of the Federal and Florida Constitutions "whenever a police officer accosts an individual and restrains his freedom to walk away . . ." Terry v. Ohio, 392 U.S. 1, 16 (1968); Brown v. Texas, 433 U.S. 47 (1979).

The Florida District Court found the appropriate test to be set forth in the case of United States v. Wylie, 596 F.2d 62, 68 (U.S.App.D.C. 1977):

> "[T]he crucial consideration is . . . whether the person was 'under a reasonable impression that he [was] not free to leave the officer's presence'".

State v. Frost, 374 So.2d 593, 597 (Fla. 3d DCA 1979).

The Frost opinion discusses two different plateaus at which a seizure may occur. The more lenient level deals with the social pressures inherent in a police-citizen contact. The more stringent approach would require police action which actually interferes with a persons right to leave. Under either analysis, Sherolyn Harrison was seized.

When a police officer approaches a citizen by displaying a badge and requesting 1) identification, 2) permission to interrogate, and 3) permission to search one's personal belongings, as occurred in this instance (A. 19-23), a variety of emotions are visited upon a citizen, including apprehension, anxiety, pressure, acquiesence and all of society's unexpressed rules of etiquette. The Florida Court quoted in Frost the following passage from United States v. Coleman, 450 F.Supp. 433, 439 (E.D.Mich. 1978).

> [T]he Court is satisfied that from the moment that Agent Markonni identified himself as a DEA Agent and began to ask defendant questions on the sidewalk outside the terminal, a Terry stop had been effected. True, defendant could have ignored the agent and refused to converse with him, but such conduct on Colemen's part would have been, at the very least, a breach of etiquette, an act of discourtesy and incivility which would not be expected of the ordinary, reasonable person innocent of crime. In the opinion of this Court, when an officer, upon a show of authority accosts a suspect and takes advantage of social pressures which inhibit the suspect from declining to deal with him, he restrains the suspect's liberty to the extent required to constitute a Terry stop.[1]

Cf. Delaware v. Prouse, 440 U.S. ___, 99 S.Ct. 1391, 1398 (1979) ("stops generally entail law-enforcement officers signalling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety.")

So that, when Wolfe approached Harrison and Raymond requesting identification and displaying her police badge, they were seized. See United States v. Dewberry, 425 F.Supp. 1336 (E.D.Mich. 1977)(on agents approaching Dewberry and asking for identification, Terry stop occurred); Adams v. Williams, 407 U.S. 143 (1972)(approaching suspect in a car and asking him to step outside a seizure); State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979)(asking two boys on bicycles to stop so that they could be interviewed a seizure); Brown v. Texas, 443 U.S. ___, 99 S.Ct. 2637 (1979)(asking suspect for identification a Terry seizure); United States v. Pope, 561 F.2d 663 (1st Cir. 1977)(agent approaching subject to talk while displaying police credentials a seizure); United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977)(request by agent for identification a seizure).

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[1] Subsequently, Florida's Third District Court of Appeal rejected the idea that a person is seized under constitutional analysis when he is approached for conversation by a police officer. See Login v. State, ___ So.2d ___ (Fla. 3d DCA 1981)(Case No. 79-1551, Op. Filed February 17, 1981).

Going further, the actual seizure of Harrison occurred when Detective Titus detained Evans. Wolfe testified that only Evans purchased tickets, and no exchange of tickets occurred between Evans and Harrison as they approached the boarding gate. (A. 15-17, 37-41). So when Evans was detained for questioning by Titus, Harrison too was no longer free to depart on the scheduled flight unless Evans or the tickets were released. Thus, as in Frost, the defendant was actually seized in the sense that police officers were acting to separate her from her ticket; in Terry jargon, her "freedom to leave" was no longer a decision that was hers to make. Frost, supra at 598.

A seizure being visited upon Sherolyn Harrison, an analysis of the facts known to the police officers which occasioned the stop is next required to display its illegality from the inspection.

REASONABLE SUSPICION

> It was a maxim with Foxey . . .
> "Always suspect everybody." Dickens,
> The Old Curiosity Shop, (1841)[2]

When a police officer has a reasonable suspicion that an individual is engaged in criminal activity, a limited investigatory stop on less than probable cause is constitutionally permissible. Terry v. Ohio, supra; Parker v. State, 363 So.2d 383 (Fla. 3d DCA 1978); Mullins v. State, 366 So.2d 1162 (Fla. 1979); See Florida Statutes 901.151 (1979). The officer must be able to point to "specific and articulable facts" which must "be judged against an objective standard" to guard against feelings or hunches lacking in substance. United States v. Tharpe, 536 F.2d 1098 (5th Cir. 1976).

The objective facts known to Officer Wolfe when she detained Sherolyn Harrison for an investigatory stop do not rise to the level of hunch, let alone articulable suspicion. Wolfe saw Evans attempting to quickly purchase tickets with cash for a Los Angeles flight leaving in ten minutes, and check no luggage,

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2 Costantino, District Judge, United States v. Westerbann-Martinez, 435 F.Supp. 690 (E.D.N.Y. 1977).

though holding one bag. (A. 14-17). Wolfe knew Evans was with Nancy Raymond; when Raymond and Evans joined Harrison, who was carrying a baby, and they began walking together down the concourse was the first occasion Wolfe had to associate Harrison with the others. (A. 18, 38-42).

Officer Wolfe testified that the only "suspicious" activity attributable to Harrison was in fact her inactivity; that is, Wolfe considered it suspicious that Harrison did not accompany Evans and Raymond while the tickets were being purchased. (A. 36-39). In fact, Wolfe agreed that when she first encountered Harrison, a possibility existed that Harrison was merely at the airport to see the others off. (A. 39).

The issue summarily restated, does walking down an airport concourse with a man and woman who purchased with cash tickets to Los Angeles on a flight leaving in ten minutes, while checking no luggage yet carrying two pieces, create reasonable suspicion that one is engaged in a criminal enterpirse?[3] A review of existing law reveals not.

Of course the observation that a person exhibits some of the general characteristics and conduct of the reputed "drug courier profile"[4] does not create a reasonable basis for an investigatory stop. Reid v. Georgia, ___U.S. ____, 100 S.Ct. 2752 (1980); Frost v. State, supra at 596, fn. 4; Mitchell v. State, 377 So.2d 1006 (Fla. 2d DCA 1979); United States v. Ballard, 573 F.2d 913 (5th Cir. 1978); United States v. Pope, 561 F.2d 663 (6th Cir. 1977); United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977); United States v. Chatman, 573 F.2d 565 (9th Cir. 1978); United States v. Rice, 594 F.2d (2d Cir. 1979):

> [3] No doubt the cumulative experience of the special agents in the

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3 Of course, the officers first suspected the use of an aliases by the travelers, and that no other luggage was being carried after the investigatory stop contested here.

4 No testimony was adduced by Wolfe of what characteristics of the profile Evans, Raymond or Harrison met, if any; not what the profile actually consists of.

> surveillance details at the airports must give rise to a kind of institutional expertness that can be in part summed into a check list of recurrent traits of conduct found in narcotics couriers. But such a check list of recurrent characteristics can do no more than alert the special agent to initiate surveillance. More is required to warrant the intrusion of an investigative stop. [cites omitted]

Clearly no reasonable basis justified the stop of Harrison due to the actions of Evans or Raymond. In any event, "suspicious" activity is personal to the actor, and not vicarous to all present. Even if the conduct of Evans justified surveillance the only "suspicious activity" attributed to Harrison was her waiting elsewhere in the airport while Evans negotiated his travel arrangements. (A. 31-42). Merely accompanying a suspect does not impute suspicion. State v. Perry, 296 So.2d 505 (Fla. 3d DCA 1974)(defendant standing with subject arrested on a warrant did not provide for frisk of defendant); Ybarra v. Illinois, ___ U.S. ___, 100 S.Ct. 338 (1979)(patron of a tavern not subject to frisk in execution of a warrant due to presence alone).

In the course of the invalid investigatory encounter Wolfe espied what occurred to her to be a suspicious bulge in the diaper of the baby. (A. 27-29). The police foray being invalid in its inception, the seizure of the contraband was, too, illegal police conduct, and suppression of the contraband seized was required. Wong Sun v. United States, 371 U.S. 471 (1963); State v. Coladonato, 348 So.2d 326 (Fla. 1977)(when defendant improperly detained, observation by police of stolen merchandise in plain view inadmissible as a fruit of illegality); Mullins v. State, 366 So.2d 1162 (Fla. 1979)(detention of defendant without reasonable suspicion invalidated plain view seizure of contraband). Accord, see State v. Whitley, 349 So.2d 840 (Fla. 3d DCA 1977); State v. Horton, 375 So.2d 1112 (Fla. 3d DCA 1979); State v. Laurich, 376 So.2d 405 (Fla. 1st DCA 1979); Currens v. State, 363 So.2d 1116 (Fla. 4th DCA 1978); State v. Delp, 364 So.2d 542 (Fla. 4th DCA 1978).

B

The Florida District Court of Appeal Properly Reversed The Trial Court's Denial Of The Defendant's Motion To Suppress Evidence When The Contraband Was Seized Without Probable Cause, In Violation Of The Fourth And Fourteenth Amendments To The United States Constitution And Article I, Section 12 Of the Florida Constitution.

Assuming arguendo that the search and seizure of the contraband from the diapers of the child carried by the defendant had no relationship to the illegal detention, surveillance and encounter of the defendant by the police discussed above, the search and seizure nevertheless was independently improper and ran afoul of the Federal and Florida Constitutions.

As a result of their investigatory stop of the travelers and a search of their persons, nothing of futher suspiciousness was found pertaining to Harrison. (A. 38-48). Only with regard to the search of Raymond did the officers learn that the three were traveling under a possible alias, and days earlier three people had flown from Los Angeles to Miami; two marijuana cigarettes found in Raymond's purse were considered inconsequential by the officers, and no intention to arrest for the misdemeanor existed in Wolfe's mind. (A. 43-47).

With this imformation, Wolfe first spotted a bulge in the childs diaper. (A. 50). Wolfe told Harrison to put the child down, and an immediate search of the child's clothing revealed the hidden contraband sought to be suppressed. (A. 51-56).[5] Wolfe said she thought the bulge was narcotics, rather than a weapon; the item seized was 1 - 1 1/2 inches in thickness and extended out of the baby's diaper about 2 inches. (A. 49, 50).

To sustain the search of the diaper, Wolfe must have had probable cause to believe contraband was hidden on the baby. Reliance on the investigatory frisk condoned by Terry, supra, and

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5 The court rejected out of hand the contention made by the State that Harrison had no reasonable expectation of privacy in the baby she was carrying. (A. 68).

Adams v. Williams, supra is unfounded. Absent an objective fear on the part of the officer, or the belief of a hidden weapon, searches are not contenanced. State v. Meeks, 356 So.2d 45 (Fla. 3d DCA 1978); Sibron v. New York, 392 U.S. 40 (1968); State v. Ingram, 364 So.2d 821 (Fla. 4th DCA 1978). Furthermore, the search allowed is limited to a frisk, or patdown to reveal the existance of a weapon; a full blown search as Wolfe conducted is not permitted. State v. Froley, 374 So.2d 1122 (Fla. 4th DCA 1979); State v. Lundy, 334 So.2d 671 (Fla. 4th DCA 1976).

So to validate the search of the child under constitutional principles, this Court must find an attenuation from the initial illegality, and that when Wolfe saw what she termed a bulge in the baby's diapers, she had probable cause to believe contraband was hidden therein.

Surely the proliferation of narcotics trafficking has not brought us to the era where bulges in baby's in airports are, to reasonably prudent people, narcotics, rather than the miscellaneous attendants to a child yet toilet-trained. There is nothing magical about a bulge that instantly creates an association with narcotics. See Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978)(observation by officer of two hand-rolled cigarettes unevenly rolled did not amount to probably cause to believe there was contraband therein) and Harris v. State, 352 So.2d 1269 (Fla. 2d DCA 1977)(observation by officer of rolled up plastic bag possessed by defendant did not amount to probable cause to believe contraband within bag).

Probable cause is lacking if the circumstances relied on are

> "susceptible to a variety of credible interpretations not necessarily compatible with nefarious activities." [cites omitted]

United States v. Moore, 483 F.2d 1361 (9th Cir. 1973). Moreover,

> "[P]robable cause at the time of arrest is determined by examining 'whether at that moment the facts and circumstances within . . . [the agents] knowledge and of which

> they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense'".

Beck v. Ohio, 379 U.S. 89, 91 (1964). See Conner v. State, 349 So.2d 709 (Fla. 1st DCA 1977)(observation by officer of defendant take something out of his hat and put it in his shoe not probable cause to stop or search) and State v. Neri, 290 So.2d 500 (Fla. 2d DCA 1979)(observation by officer of two men walking away from an unlit home in a high burglary area did not justify their stop and subsequent arrest for possession of contraband.)

In fact, Chief Judge Hubbart of the Florida District Court of Appeal concurred in the reversal of Harrison's conviction, stating

> I concur in the court's reversal in this cause solely on the ground that there was no reasonable basis on this record for the police to have conducted a full blown search of the defendant - even assuming, as the state contends, that the police either effected no prior temporary stop of the defendant at the airport or did so based on founded suspicion. As such, the search here was unreasonable and its fruits should have been suppressed by the trial court upon the defendant's timely motion. Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); Isham v. State, 369 So.2d 103 (Fla. 4th DCA 1979), cert. denied, 381 So.2d 770 (Fla. 1980); Schnick v. State, 362 So.2d 423 (Fla. 4th DCA 1978); Meeks v. State, 356 So.2d 45 (Fla. 2d DCA), cert. denied, 364 So.2d 892 (Fla. 1978); Carr v. State, 353 So.2d 958 (Fla. 2d DCA 1978); Harris v. State, 352 So.2d 1269 (Fla. 2d DCA 1977); Conner v. State, 349 So. 2d 709 (Fla. 1st DCA 1977).

(A. 73).

CONCLUSION

The Florida District Court of Appeal has properly applied, in reversing the trial court's denial of the defendant's motion to suppress evidence, decision pronounced by this Court and the Florida Supreme Court. No substantial federal issue has been presented to invoke this Court's jurisdiction.

Respectfully submitted,

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BY: _____
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Public Defender

BY: _____
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Assistant Public Defender

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1449

THE STATE OF FLORIDA,)
Petitioner,)
vs.) AFFIDAVIT OF FILING BY FIRST CLASS UNITED STATES MAIL PURSUANT TO RULE 28.2
SHEROLYN DENISE HARRISON,)
Respondent.)
)

CAME AND APPEARED, BEFORE ME, the undersigned authority, ELLIOT H. SCHERKER, Assistant Public Defender and PETER RABEN, Assistant Public Defender, who first being duly sworn, deposes and says:

That on April 7, 1981, he placed in a United States Post Office box, with first class postage prepaid, one (1) copy of the Brief of Respondent, Sherolyn Denise Harrison, in the above reference case, and said brief was duly and properly addressed to the Clerk of the United States Supreme Court. Further, he is a duly sworn and authorized member of the Bar of this Court

ELLIOT H. SCHERKER
Assistant Public Defender

PETER RABEN
Assistant Public Defender

STATE OF FLORIDA :
SS
COUNTY OF DADE :

SWORN TO AND SUBCRIBED TO before me on this 7th day of April, 1981, at Miami, Dade County, Florida

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 10 1982
BONDED THRU GENERAL INS. UNDERWRITERS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1449

THE STATE OF FLORIDA,	)	
Petitioner,	)	
vs.	)	CERTIFICATE OF SERVICE
SHEROLYN DENISE HARRISON,	)	
Respondent.	)	
	)	

I HEREBY CERTIFY, that one (1) true and correct copy of the Brief of Respondent, was furnished by mail to Calvin L. Fox, Assistant Attorney General, Attorney for Petitioner, Suite 820, 401 N.W. Second Avenue, Miami, Florida, 33138, on this 6th day of April, 1981, by United States Mail, First Class Delivery prepaid.

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